SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

1. Both the Attorney General and the appellees argue that appellant corporation has no standing to challenge the

constitutionality of the statute which mandated its disqualification (A.G.Br. pp. 20-22; H.A.Br. pp. 34-36).*

The reason they assert for this is that a corporation cannot assert the privilege against self-incrimination.

Both have totally misconceived the issue. Appellant is not asserting the privilege against self-incrimination. Appellant is objecting to a penalty imposed against it under a statute that declares that it was a punishable wrong for one of appellant's former officers to have refused to waive his privilege against self-incrimination. Appellant's argument is that the assertion of the privilege cannot be made a wrong from which penalties flow, and that a statute which imposes such penalties is unconstitutional.

The argument against appellant's standing is like denying to a master in a *respondeat superior* case the opportunity to show that the servant's conduct was not tortious. If George Campbell, Jr. committed no punishable wrong by refusing to waive his privilege against self-incrimination, then *a fortiori* the appellant has committed no punishable wrong. If the statute is unconstitutional because it makes the assertion of the privilege a punishable offense, then surely appellant, as victim of the punishment, has standing to object.

Neither the Attorney General nor appellees Housing Authority have come to grips with the issue posed by the *Malloy, Griffin* and *Spevack* cases (see Appellant's Brief,

* Reference to the Attorney General's brief will be designated "A.G.Br." followed by the page number; reference to the appellees' brief will be designated "H.A.Br." followed by the page number.

pp. 10-12), that even if the State's action had not been arbitrary under the *Slochower* test, the statute still would be repugnant to the Constitution in that it punishes people because of their assertion of the privilege against self-incrimination. Both argue, however, that the privilege must bend to the overriding interests of the State. But, while the due process clause has always been applied with a view toward resolving the competing interests of the State and the individual, this has not been the case with the privilege against self-incrimination which has always been deemed an essential inconvenience for the government. *Hoffman* v. *United States,* 341 U. S. 479, 95 L.ed. 1118, 71 S.Ct. 814 (1950).

The privilege against self-incrimination, then, is not subject to any balancing of interests. Complete immunity is essential as the *quid pro quo* for compulsory testimony. See opinion of Mr. Justice Brandeis in *McCarthy* v. *Arndstein,* 266 U. S. 34, 42, 69 L.ed. 158, 161, 45 S.Ct. 16 (1924). The Attorney General argues that the decision in *Garrity* v. *New Jersey* makes the rule in *Spevack* v. *Klein* superfluous (A.G.Br. p. 15). But this cannot be so long as *Stevens* v. *Marks* is still good law. 383 U. S. 234, 15 L.ed. 2d 724, 86 S.Ct. 788 (1966). *Garrity* held that the testimony coerced by threat of dismissal could not be introduced in evidence. In *Stevens* v. *Marks* this Court, citing *Raley* v. *Ohio,* 360 U. S. 423, 3 L.ed. 2d 1344, 79 S.Ct. 1257 (1959), noted that anything short of full and complete immunity was inadequate as a *quid pro quo* for compulsory self-incrimination (383 U. S. at p. 246).

Appellees and the Attorney General would have this Court believe that Sections 2601 and 2602 of the Public

Authorities Law are the only effective means available to the State to accomplish its legitimate ends. Plainly, this is not so. The State could compel the testimony of witnesses by granting them immunity and, if their testimony showed them to be unfit, then the result could be disqualification. The State cannot complain that it will lose the opportunity to punish criminals, for if the State could not convict without self-incriminatory testimony, then it would lose nothing by granting immunity. It is perfectly feasible and constitutional to provide immunity in exchange for compulsory testimony. Moreover, it also makes more sense to disqualify for actual misconduct than for asserting constitutional rights.

2. Both the Attorney General and appellees argue that the Public Authorities Law, Sections 2601 and 2602 fulfill an important state purpose of obtaining information about the qualifications of potential contractors (A.G.Br. pp. 10-16; H.A.Br. pp. 11-17). But, a Grand Jury cannot supply the State with any useful information because its proceedings are secret. Code of Crim. Proc. §§258 and 259.

Even before the *Spevack* case New York courts distinguished between the reasonable requirement of candor before appropriate boards of inquiry and the behaviour of witnesses in the Grand Jury room. Thus, in *In Re Solovei*, 250 App. Div. 117, 293 N.Y.S. 640 (2nd Dept. 1937), aff'd without opinion 276 N.Y. 647, 12 N.E.2d 802 (1938), an attorney asserted his privilege against self-incrimination before a Grand Jury without suffering any professional sanction. The Court distinguished between a refusal to waive immunity and a refusal to answer questions. Similarly, in

In Re Grae, 282 N.Y. 428, 26 N.E.(2d) 963 (1940), the refusal to sign a waiver of immunity even in a bar association inquiry was held not to be the equivalent of a refusal to be candid. See also, *In Re Ellis,* 282 N.Y. 435, 26 N.E.2d 967 (1940); *In Re Levy,* 255 N.Y. 223, 174 N.E. 461 (1931); *In Re Rouss,* 221 N.Y. 81, 116 N.E. 782 (1917), Cert. den. 246 U.S. 661, 62 L.ed. 927, 38 S.Ct. 332 (1918); and *In Re Kaffenburgh,* 188 N.Y. 49, 80 N.E. 570 (1907). Here, as in *Grae,* there was no refusal to answer, there was only a refusal to waive immunity.

Appellees and the Attorney General in their arguments have failed to recognize the vast distinction between the closed hearing conducted by a Grand Jury and one conducted by a board of inquiry concerned with the qualifications of applicants or licensees.

The appellees argue (A.G.Br. pp. 14-16) that a New York Grand Jury is empowered to make presentments and issue public reports about non-public officials under the authority granted by Section 253(a) of the Code of Criminal Procedure (set forth in full in the Appendix to Appellant's Brief, pp. 25-27). They deliberately overlook the express provision of that statute which limits such powers of investigation to public officials and public employees. *In Re Grand Jury, January, 1967,* 52 Misc. 2d 895, 277 N.Y.S.2d 105 (Sup. Ct. Cortland Co. 1967). Neither the statute nor any case or authority has been cited by appellees which would remotely suggest that the Grand Jury has been granted general investigatory powers. The only decided case holds otherwise and, indeed, imposed a further limitation that the investigation cannot have been spontaneous. *In Re Grand Jury, January, 1967, supra.*

Consequently, even if the sole test were due process, the statute as applied here does not pass even the requirements laid down by *Slochower*. No questions were asked, and the inquiry was not related to a determination of fitness.

3. The appellees imply (H.A.Br. p. 9) that perhaps this Court ought to indulge in reading between the lines for some unspecified relevance concerning the fact that on the opening day of trial appellant pleaded guilty to a single misdemeanor count, Penal Law §581A, to cover two indictments. Appellant rejects this contention because, if there is to be reading between the lines, it is more relevant that if appellant had to defend itself during a three months' mass conspiracy trial the cost would have exceeded by far the maximum fine that could be imposed under Penal Law §581A.

The District Attorney consented to the misdemeanor plea and agreed to allow it to cover two indictments. During the trial neither the prosecution nor the defense called George Campbell, Jr. or any other person connected with appellant to testify. District Attorneys do not ordinarily consent to misdemeanor pleas without a plea bargain unless they believe that the degree of culpability and the risks of trial warrant it. The court also accepted the misdemeanor plea.

4. Finally, the appellees argue that a proceeding under §2603 is available to appellant and that this would satisfy all of its due process objections (H.A.Br. pp. 17-20). What they fail to observe is that the Court of Appeals held that the statute's reference to "officers" includes former officers whose resignations occurred at the time they planned to

refuse to waive their privilege against self-incrimination (A42-43). All that the Court of Appeals suggested was that there was discretion under §2603 to grant relief from a proper disqualification if the application of the statute worked an unnecessary hardship. Appellant's claim is that its disqualification was improper. Appellant is not begging for forgiveness, which is all that the statutory remedy involves. It has a right not to be penalized by an invalid statute. Its remedy cannot be limited by that same statute.

Respectfully submitted,

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